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Mountains Recreation and Conservation Authority v. City of Whittier, BS136211

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Matrix Oil Corporation et al., Real Parties-in-Interest

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Los Angeles County Regional Park and Open Space District, County of Los Angeles, et al.,

Cross-Complainants/Cross-Petitioners

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Santa Monica Mountains Conservancy v. City of Whittier, BS138796 (~~consolidated~~ related with BS 136211)

Tentative Decision on Petition for Writ of Mandate, Breach of Contract, and Declaratory Relief: granted in large part

Petitioner Mountains Recreation and Conservation Authority ("MRCA") seeks relief against the City of Whittier and the Whittier City Council (collectively, "Whittier") and Matrix Oil Corporation ("Matrix"). Los Angeles County Regional Park and Open Space District ("District") and County of Los Angeles ("County") also seek relief against Whittier and Matrix by way of Cross-Petition/Cross-Complaint.

The court has read and considered the joint moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioner MRCA's Complaint and Petition was filed on February 24, 2012 and alleges

claims against Respondents/Defendants[1] Whittier, County, and District for violation of Proposition A ("Prop. A"), the public trust doctrine, specific performance, breach of contract, and declaratory relief. The Petition named Real Parties-in-Interest Matrix, Clayton Williams Energy, Inc. ("Clayton"), and Puente Hills Landfill Native Habitat Preservation Authority ("Habitat Authority").

On August 3, 2012, MRCA filed its First Amended Petition ("FAP") to include Whittier's May 8, 2012 and June 19, 2012 lease amendments, and to add Chevron U.S.A., Inc. ("Chevron") and the Santa Monica Mountains Conservancy ("SMMC") as Real Parties-in-Interest.

On October 25, 2012, the District and County (collectively, "District") filed a Cross-Petition against Whittier for violation of Prop. A and the public trust doctrine, breach of contract (specific performance), violation of the California Environmental Quality Act ("CEQA"), and declaratory relief. The Cross-Petition named Matrix, Clayton, Habitat Authority, SMMC, and Chevron as Real Parties-in-Interest.

After unsuccessfully seeking to intervene, SMMC filed a separate lawsuit against Whittier on August 6, 2012 (LASC No. BS138796), alleging claims based upon Prop. A and for declaratory and injunctive relief. The court has related and consolidated the two cases.

On February 21, 2013, the court denied Petitioners' application for a preliminary injunction based on a conclusion that the balancing of harms worked in favor of Matrix and Whittier. The court permitted Matrix to proceed with Phase One of its Project at its own risk.

After the preliminary injunction hearing, the parties stipulated, and the court ordered, *inter alia*, that the court's writ proceeding will determine all causes of action in MRCA's FAP and the County's Cross-Complaint, with the exception, after a necessary predicate court determination, of a claim by MRCA/SMMC for damages or the District for funds under Prop. A section 16(b).

The only parties appearing in this lawsuit and for trial are, on the Petitioners' side, MRCA, District, County, and SMMC, and on the Respondents side, Whittier, Matrix, and Clayton.

B. Cast of Characters

1. Entities

Petitioner MRCA is a joint powers authority of the State of California created pursuant to Government Code section 6500 *et seq*. MRCA's Charter requires it to protect wilderness and open space.

Petitioner SMMC is a political subdivision of California that supports the acquisition and preservation of public open space and the protection of natural resources. SMMC is a member of MRCA.

Cross-Petitioner County is a charter county and the legislative body charged with formation of, and levying assessments for, the District.

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[1]For convenience, the court will refer to a Petition and Complaint as a "Petition," each Respondent/Defendant as a "Respondent," and the Cross-Petition/Cross-Complaint as the "Cross-Petition."

Cross-Petitioner District was created as a result of the passage of Prop. A in 1992. It was established by the County's Board of Supervisors for the purpose of improving the safety of recreation areas and acquiring, restoring and preserving parks, wildlife and open space resources for all residents and establishing assessments to fund these purposes.

Respondent Whittier is a charter city located in the County.

Real Party Matrix is a private oil and natural gas production company.

Real Party Clayton is a private oil and gas Delaware corporation doing business in California.

Habitat Authority is a public agency joint powers authority consisting of Whittier, the County, and Los Angeles County Sanitation District No. 2, with participation by a representative of the Hacienda Heights Improvement Association. Habitat Authority manages wilderness land in the Whittier Hills.

Chevron is a private oil and natural gas production company.

Pacific Coast Homes ("PCH") is an entity which obtained an option from Chevron to acquire the Chevron Tract.

The Trust For Public Land ("TPL") is a non-profit entity founded in 1972 with the mission of conserving land for public enjoyment.

2. Properties

The Puente-Chino Hills Wildlife Corridor is an unbroken zone of natural wildlife habitat extending nearly 31 miles from Orange County to the west end of the Puente Hills above Whittier Narrows.

The Puente Hills Landfill Native Habitat Preserve is a preserve which has been set aside for open space and habitat preservation and is managed for Whittier by the Habitat Authority.

The Whittier Hills Property consists of the Chevron Tract, a 960 acre property previously owned by Chevron, and the Unocal Tract, a 320 acre property previously owned by Unocal. The total acreage of the Whittier Hills Property is 1,280 acres. For more than 100 years, the Whittier Hills Property consisted of oil fields. The oil fields ceased production in the early 1990's.

The Chevron Tract is a 960 acre property in the Whittier Hills Property previously owned by Chevron. The Chevron Tract is part of the Puente Hills Native Habitat Reserve.

The Chevron Tract contains a Core Habitat Management Zone. A Core Habitat Management Zone includes areas not open to the public, existing for the sole purpose of providing undisturbed habitat for wildlife. The Core Habitat Zone in the Chevron Tract is an area called La Canada Verde.

The Unocal Tract is a 320 acre property in the Whittier Hills Property previously owned by Unocal.

C. Statement of Facts[2]

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[2]The joint exhibits submitted by the parties are received into evidence for all claims.

Respondents have filed joint written objections to most of the paragraph in Petitioners' supporting declarations. The court has ruled on these objections by placing "S" for "sustained" and "O" for "overruled" next to the objection, sometimes with a comment. By way of

1. Prop. A

In 1992, the County's voters approved Prop. A with a 64% yes vote. The purpose of Prop. A was to acquire, restore and preserve parks, wildlife and open space resources. The District was created at the same time. The governing body of the District is the County's Board of Supervisors. All powers and authority of the District are vested in the Board in its capacity as the governing body of the District. *See* Pub. Res. Code §5506.9.

Prop. A provides that the District shall take all actions necessary and desirable to carry out Prop. A's purposes. It placed an annual assessment, apportioned in compliance with Pub. Res. Code section 5539.9, to fairly distribute the cost in proportion to the benefits to be received, on most parcels in the County and the County-issued bonds, to be repaid by taxpayers. These funds provide over $530 million for the acquisition of real property for parks, recreation trails, wildlife habitat, and natural lands throughout the County.

Prop. A section 8(b)(2) QQ allocated $9,300,000 to Whittier for acquisition of natural lands in the Whittier Hills. 1 AR 257. In addition, SMMC was allocated forty million dollars, with the proviso that "[n]ot less than seven million dollars ($7,000,000) shall be expended in the Whittier Hills...." 1 AR 258.

Prop. A section 16(b) contemplates that land acquired with Prop. A funds might be sold or disposed of at some later point, and sets forth the obligations generated when an owner disposes of property purchased with these funds:

> "If the use of the property acquired through grants pursuant to this order is changed to one other than a use permitted under the category from which the funds were provided, or the property is sold or otherwise disposed of, an amount equal to the (1) amount of the grant, (2) the fair market value of the real property, or (3) the proceeds from the portion of such property acquired, developed, improved, rehabilitated or restored with the grant, whichever is greater, shall be used by the recipient, subject to subdivision a of this Section, for a purpose authorized in that category or shall be reimbursed to the Parks Fund and be available for appropriation only for a use authorized in that category."
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> "If the property sold or otherwise disposed of is less than the entire interest in the property originally acquired, developed, improved, rehabilitated or restored with the grant, an amount equal to the proceeds or the fair market value of the property interest sold or otherwise disposed of, whichever is greater, shall be used by the grantee, subject to subdivision (a) of this Section, for a purpose authorized in that category or shall be reimbursed to the Parks

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explanation, many of the objections were overbroad (made to entire lengthy paragraphs), and sometimes frivolous (objections as to who the declarant was or their statement of background). Many objections were overruled under Fibreboard Paper Products Corp. v. East Bay Union of Machinists, (1964) 227 Cal.App.2d 675, 712, which permits an objection to be overruled where any part of the material is admissible.

Fund and be available for appropriation only for a use authorized in that category. Nothing in this Section 16 shall limit a Public Agency from transferring property acquired pursuant to this order to the National Park Service or the State Park System, with or without consideration." (1 AR 261).

2. The Whittier/District Project Agreement.

Prop. A requires the submission of an application to the District in order to receive funding.

On July 6, 1993, Whittier adopted Resolution No. 6416 approving the filing of an application with the District for funds under Prop. A section 8(b)(2) QQ ("Whittier's Application" or the "Application") and certified that it "understands the assurances and certifications in the application form[.]" 2AR 504. The assurances in the Application form state that Whittier will (1) "use the property only for the purposes of the Proposition and will make no other use, sale, or other disposition of the property except as authorized by specific act of the Board of Supervisors as the governing body of the District." and (2) "maintain and operate the property acquired, developed, rehabilitated, or restored with the funds in perpetuity." 2 AR 506.

Whittier's Application sought $9.3 million and described the project as the acquisition of 4,000+ acres of hillside area. The proposed park would "preserve portions of the last remaining chaparral, native oak woodlands and coastal scrub ecosystem within eastern Los Angeles County." Part of the acreage is designated by the County as Significant Ecological Areas. Whittier stated it was acquiring the land "for wildlife conservation purposes." Whittier's Proposition A Application did not include oil drilling in the project description.

The District approved Whittier's Application and in November 1993 the parties entered into a Project Agreement (the "Project Agreement") for a grant of $9,300,000 for the acquisition of approximately 4,000 acres in the Whittier Hills. 3 AR 510-522.

The Project Agreement provides for the District's approval rights to contracts and changes to the Project and its uses as follows:

> "...Any modification or alteration in the Project, as set forth in the Application on file with the District, must be submitted in writing to the District for prior approval. No modification shall be effective until and unless the modification is executed by both Applicant and District." (3 AR 514);
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> "....[a]ny and all existing or proposed operating agreements, leases, concession agreements, management contracts, or similar arrangements with non-governmental entities, and any existing or proposed amendments or modifications thereto, as they relate to the Project or the Project site [must be submitted to the District for prior review and approval]." (3 AR 516);
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> "In order to maintain the federal income tax exemption for federal income tax purposes of the interest on any [taxpayer-funded bonds issued to pursuant to Prop.. A], Applicant....hereby agrees that it would not, without the prior written

consent of the District, (a) permit the use of any portion of the Project by any private person or entity, other than on such terms as may apply to the public generally; or (b) enter into any contract for the management or operation of the Project or any portion thereof, except with a governmental agency or a nonprofit corporation....." (3 AR 516-17);

"Applicant agrees to use the property acquired or developed with grant monies under this Agreement only for the purpose for which it requested District grant monies and will not permit any other use of the area, except as allowed by specific act of the Board of Supervisors as the governing body of the District...." (3 AR 520).

Whittier also agreed in the Project Agreement to comply with "The Proposition A Procedural Guide," which expressly requires "prior District approval" for (1) any proposed lease agreement with a non-government entity and (2) any non-governmental use, operations, management or other activity on the site. 3 AR 299, 320.

The Project Agreement further expressly contemplates the disposition of land purchased with the grant funds:

"If Applicant sells or otherwise disposes of property acquired or developed with grant monies provided under this Agreement, Applicant shall reimburse the District in an amount equal to the greater of 1) the amount of grant monies provided under this Agreement; 2) the fair market value of the real property; or 3) the proceeds from the portion of the property acquired, developed, improved, rehabilitated or restored with grant monies."

"If the property sold or otherwise disposed of is less than the entire interest in the property originally acquired, developed, improved, rehabilitated or restored with the grant monies, then Applicant shall reimburse the District an amount equal to the greater of: 1) an amount equal to the proceeds; or 2) the fair market value." (3 AR 517).

Unlike the other cited provisions, the Project Agreement does not require the District's consent prior to disposing of or selling Prop. A property.

Whittier's grant closed as of July 30, 2007. Thereafter, Whittier reaffirmed its commitment to maintain the property as open space consistent with Prop. A's purpose except as approved otherwise by the District. *See e.g.*, 4AR 949-50 (April 1996 letter agreeing not permit any other use of the property except as consented to by the Board and SMMC).

3. <u>The SMMC Project Agreement</u>

SMMC also entered into an agreement with the District for the grant of $7 million in Prop.. A funds (the "SMMC Project Agreement"). 3 AR 557-70. The grant was received for the purpose of acquiring and improving open space in the Whittier Hills, which SMMC could

provide to a "Qualified Public Agency," including MRCA. 3 AR 557-58. The SMMC Project Agreement contains the same terms as Whittier's Project Agreement, including the term concerning disposition or sale of property acquired with grant monies. 3 AR 565.

SMMC authorized a grant of $7 million to MRCA for the acquisition of the Chevron Tract. 4 AR 801.

4. Whittier's Purchase of the Chevron Tract

In December 1995, Whittier acquired the Chevron Tract through a series of transactions that resulted in a triple closing on December 26, 1995.

5. The PCH/TPL Purchase Agreement

On August 2, 1995, PCH, the holder of an option from Chevron[3] for the Chevron Tract, entered into an agreement to sell the Chevron Tract to TPL for $5.25 million (the "PCH/TPL Sale Agreement"). In the contract, PCH reserved the right to create a "Conservation Easement":

> "reserve[d] the right to grant and transfer the same, a non-exclusive easement in gross over and across approximately 600 contiguous acres along the northern and eastern boundaries of the Sale Property, excluding the Home Newlin Property (the "Conservation Easement") for the purpose of habitat preservation, replacement, enhancement, creation, maintenance and restoration and other environmental mitigation purposes, together with the right to enter on the Conservation Easement Area (the "Conservation Easement Area") to perform such habitat mitigation as may be legal and appropriate to mitigate for impacts incurred in connection with the development or use for oil and gas purposes of the Chevron Properties." (3 AR 676).

At the time of the PCH/TPL Sale Agreement, PCH was negotiating with the U.S. Fish and Wildlife Service ("U.S. Wildlife") for a permit under the Federal Endangered Species Act to "allow a take" of a threatened songbird (California gnatcatcher) in cleaning up the Chevron Tract. The Conservation Easement would provide PCH with a mechanism to satisfy the permit requirements. Ibid. If PCH entered into one or more agreements with, *inter alia*, U.S. Wildlife or the California Department of Fish and Game for a Habitat Conservation Plan ("HCP") which incorporated the Conservation Easement Area, TPL, as buyer, was obligated to cooperate with the performance of the HCP. TPL's duty to cooperate "in obtaining the Conservation Easement and an approved HCP" was limited to five years. 3AR 677.

The PCH/TPL Sale Agreement contained an integration clause barring evidence of a prior or contemporaneous oral agreement. 3 AR 692. *See* CCP §1856.

6. The TPL/MRCA Sale Agreement

On December 12, 1995, TPL and MRCA executed a sale agreement for MRCA to buy the

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[3]As a prerequisite to TPL's purchase of the Chevron Tract, Chevron agreed to perform an environmental assessment of soil contamination from prior oil drilling and spend up to $500,000 for environmental cleanup. 4AR 826.

Chevron Tract for $5.25 million (the "TPL/MRCA Sale Agreement"). 4 AR 806-21. The contract notes that PCH would "reserve certain rights upon the property for habitat mitigation purposes... ." 4 AR 807. As with the PCH/TPL Sale Agreement, the TPL/MRCA Sale Agreement did not expressly require that a conservation easement be placed over part of the Chevron Tract; it simply stated that MRCA accepted title subject to the HCP provided for in the PHC/TPL Sale Agreement, and was agreeing "to assume the obligations forth in Section 6.3 of the PCH Agreement." 4 AR 817-18. The TPL/MRCA Sale Agreement also included an integration clause. 4 AR 820.

7. The MRCA/Whittier Sale Agreement

On December 20, 1995, MRCA and Whittier executed an Agreement of Sale for Whittier to buy the Chevron Tract for $2.635 million (the "MRCA/Whittier Sale Agreement"). 4AR 822-36. Like the TPL/MRCA Sale Agreement, it did not expressly require any conservation easement to be recorded on a portion of the Chevron Tract. 4 AR 833. The MRCA/Whittier Sale Agreement contained an integration clause identical to that found in the TPL/MRCA Sale Agreement. *Compare*, 4 AR 835 and 4 AR 820.

8. The Closing

The closing of the three sale agreements occurred on the same day, December 26, 1995. As a result, Chevron transferred the Chevron Tract to TPL (4 AR 852-75), MRCA purchased it from TPL using $5,250,000 in Prop. A funds (4 AR 904-25), and MRCA transferred the Chevron Tract to Whittier for half that price (4 AR 926-28). The parties structured the transaction to allow MRCA and the Whittier to each use $2,625,000 of Prop. A funds in the acquisition of the Chevron Tract.

9. The Chevron Declaration

On the closing date, Chevron, as Grantor, and TPL, as Grantee, executed and recorded a Declaration and Easement of Restricted Use (the "Chevron Declaration" or the "Declaration"). 4 AR 876, 883.

The Chevron Declaration recited the following pertinent facts: (1) Chevron owned the right to grant a conservation easement to preserve and protect in perpetuity the ecosystems and habitat values of the Tract: (2) the PCH/TPL Sale Agreement intended that the property be preserved and used for open space and recreational purposes; (3) Grantor was presently negotiating with U.S. Widllife for the terms of a HCP and implementing agreement, which Grantor intended to obtain within five years; (4) the parties desired that 600 acres of the Chevron Tract (apparently, the "Restricted Property") be preserved and protected in perpetuity; (5) Grantor intended to reserve the right to preserve the Restricted Property by the grant of a conservation easement, granting such rights to U.S. Wildlife or other qualified entity to hold conservation easements, (6) TPL agreed to such reservation and to honor the intentions of Grantor. 4 AR 877(Recitals).

The parties therefore agreed:

"It is the purpose of this Declaration. . . to place an easement over a portion

of the Sale Property, defined herein below as the Conservation Easement Area, which land will be retained forever in a natural, undeveloped open space condition (subject to those uses permitted in this Declaration) and for wildlife habitat and habitat restoration purposes and to prevent any use of this Conservation Easement Area that will impair and interfere with the conservation values of the Sale Property....Grantor intends that this Declaration will limit the use of the Conservation Easement Area to activities consistent with the purpose stated above." (4 AR 877(¶1)).

The Chevron Declaration described the Restricted Property that would constitute the Conservation Easement Area upon recording the Declaration (4 AR 878(¶2)),[4] and added: "Any activity on or the use of the Conservation Easement Area inconsistent with the habitat conservation purposes or the permitted uses set forth in paragraph 6 of this Declaration is prohibited." 4 AR 880(¶8).

The Chevron Declaration reserved to Chevron the right to transfer to U.S. Wildlife, or other legally eligible entity agreed upon by Chevron and TPL, a non-exclusive easement over 600 acres of the Restricted Property for purposes of habitat preservation, replacement, enhancement, creation, maintenance and restoration and other environmental mitigation purposes. 4 AR 478 (¶3).

The Declaration noted that if Grantor entered into a Conservation Easement with U.S. Wildlife in connection with the HCP, an amendment to the Declaration would be required in which the Restricted Property would be released from the Declaration and the U.S. Wildlife Conservation Easement would be substituted in its place. 4 AR 879 (¶4).

The Declaration placed a five year limit on Chevron's right to enter into any such modified Conservation Easement, and required identification of the owner and boundaries of the existing Conservation Easement:

"If Grantor does not obtain final approval of the HCP by the Service and does not record the Conservation Easement as referenced in Paragraph 4 below within a term of five (5) years following the date of [closing], then Grantor and Grantee shall immediately (i) agree on the legally eligible entity identified herein above to hold the Conservation Easement, and (ii) agree on the boundaries of the 600 acres of the Restricted Property to be incorporated within the Conservation Easement Area. For purposes of the foregoing sentence, the term 'immediately' shall mean a reasonable period of time, not to exceed one year." (4 AR 878 (¶03)).

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[4]The parties anticipated that the "Restricted Property" for the Conservation Easement would consist of all the Property described in Exhibit B, and as much of the Property described in Exhibit C as the U.S. Wildlife approved as was necessary to create the 600 acres in the Conservation Easement Area. 4 AR 878(¶2). This approval occurred by U.S. Wildlife letter dated December 5, 1995, which the parties acknowledged. The Declaration's Exhibit D showed the Restricted Property (Conservation Easement Area). Ibid.

At no time within the five years after the grant deeds were recorded did Chevron enter into and record a modified Conservation Easement. Nor did the parties agree on the precise legal boundary of the 600 acre Restricted Property.

The Chevron Declaration defined Chevron as the Grantor, and the Grantee as "[t]he Trust for Public Land, and all successors and assigns to the Sale Property, specifically including the Mountains Recreation Conservation and Authority and the City of Whittier" 4 AR 881(¶18). The Chevron Declaration further stated that "the covenants, terms, conditions and restrictions of this Declaration shall be binding upon and anew to the benefit of the parties hereto and their respective personal...successors and assigns and shall continue as a servitude running in perpetuity with Restricted Property[.]" 4 AR 883(¶23).

10. The Unocal Tract

The remaining portion of the Whittier Hills Property, the Unocal Tract, had previously been owned by Union Oil Company of California, dba Unocal ("Unocal").

During the negotiations for purchasing the Unocal Tract, Whittier promised in a May 12, 1995 letter to Unocal that it would place a covenant on the property restricting future use once a sale agreement was reached between TPL and Whittier. 3 AR 664. The covenant would occur at the close of escrow, anticipated to be simultaneous with the close of escrow between Unocal and TPL. Ibid. The covenant would "dedicate the land to use only as future park and open space with compatible recreation uses...That methodology will result in an assurance that said covenant could not be unilaterally repealed in the future by the City of Whittier." Ibid. The letter added that the City only intended to use the Unocal Tract as park and open space, and was restricted to this purpose by Prop. A. Ibid.

The original sale from Unocal to TPL was conditioned on Whittier's covenant to use the Unocal Tract solely for open space and recreational purposes for at least 25 years. *See* 4 AR 954 (Recital C). Whittier's City Council did not feel a 25 year restriction was sufficient. 4 AR 952.

On June 10, 1996, Whittier recorded a Declaration of Restricted Use ("Unocal Declaration"). The Unocal Declaration stated that Whittier "intends and declares that the Subject Property will be used in perpetuity exclusively for public open space and recreational purposes." 4 AR 954 (¶3). The Unocal Declaration limited use of the Unocal Tract to activities consistent with public open space and recreational purposes and "in accordance with the requirements and limitations set forth in County of Los Angeles Proposition A." 4 AR 954(¶1). The Unocal Declaration prohibited uses other than those listed. 4 AR 954(¶4). The Unocal Declaration also stated that any modification of its terms must be in writing. 4 AR 954(¶8).

The Unocal Tract was purchased by Whittier from TPL on July 26, 1996 using Prop. A funds. *See* 4 AR 949-50, 953.

11. The Habitat Authority Agreement

In total, Whittier owns 1,280 acres in the Puente Hills Landfill Native Habitat Preserve (the "Preserve"), consisting of the Chevron Tract and the Unocal Tract.

On August 14, 1997, Whittier entered into a Property Acquisition and Maintenance Agreement with, *inter alia*, the Habitat Authority (the "Habitat Authority Agreement") whereby the Habitat Authority was given power to "maintain, preserve and protect" in perpetuity the

Whittier Hills Property (the Chevron and Unocal Tracts) for "public open space and recreational uses on behalf of this generation and the generations to come." 4 AR 959-65, 961.

Since 1997, the Habitat Authority has managed the Tracts for this purpose. On July 26, 2007, the Habitat Authority approved a Resource Management Plan ("RMP") to guide it in maintaining in perpetuity the public open space and recreational use of the Preserve, including the two Tracts. 5 AR 1028. The RMP designated the Chevron Tract as part of its Core Habitat Zone -- areas that were not opened to the public for the sole purpose of providing "undisturbed breeding habitat for wildlife." 5AR 1105. In addition, the RMP has a range of goals designed to maintain visual resources and aesthetics of the open space. 5 AR 1120.

12. <u>The Oil Drilling Project</u>

In 2008, Whittier began publicly exploring the possibility of oil exploration in a small portion of the 1,300 acres it owns. 6 AR 1200. An August 26, 2008 staff report prepared in connection with a Proposed Resolution of Intention to Lease explained the economics and feasibility of the oil drilling project:

> "The City owns approximately 1300 acres of former oil fields in the hills north of the developed areas of the Whittier.... This was commonly known as the Whittier Main Field which was in oil production for over 100 years. ... When oil production stopped, the oil was worth about $12 per barrel. Today, the oil is valued at approximately $100 per barrel. If the oil could be successfully extracted now, the Whittier could receive a new source of revenue for its General Fund in the form of royalty payments from an oil company. In addition to the change in value of the remaining oil deposits, technology has also changed. New methods of drilling and pumping are much less invasive to the surface land uses and the environment. We estimate the same 1300 acres of oil deposits could now be developed from approximately three surface sites of 2-3 acres each (less than half of 1% of the land). Furthermore, most of the drilling and pumping equipment can be placed in soundproof underground vaults that would not be visible. Therefore, it now appears feasible to access the valuable oil and gas resources while continuing to preserve our precious open space and wildlife habitat."
> (6 AR 1200).

The staff report recognized that Whittier had Prop. A obligations in using the Chevron and Unocal Tracts for this project:

> "Conditions of [Prop. A] funding prevent the City from using the property for anything other than open space. In order to make available for drilling and pumping approximately 8 acres of the surface in the 1300 acre mineral lease area, the City will have to either reimburse a portion of the Proposition A funds, or provide an additional comparable area of land that can be used for open space to compensate for that area used for surface facilities in oil production."

(6 AR 1203).[5]

13. The Lease

Whittier's City Council adopted a Resolution of Intent to lease the Tracts for oil and gas production and initiated a bidding process. 6 AR 1348. The Resolution informed prospective bidders that the property was subject to Prop. A and a conditional use permit ("CUP") would not be issued unless Whittier obtained a release for the from protected area status from the District. 6 AR 1349.

On October 28, 2008, Whittier entered into an oil, gas and mineral lease with Matrix and Clayton (the "Lease") to allow oil and gas drilling, processing, and related activities on the 1,280 acres that make up the Chevron and Unocal Tracts. 6 AR 1357. The Lease allowed the drilling and operation of six wells, with additional wells subject to Whittier's sole discretion. 6 AR 1360. The Lease stated that the District's approval was required to release the Tracts from Prop. A protected status. 6 AR 1359.

Matrix submitted an application for a CUP in connection with the oil drilling project, and Whittier prepared a draft Environmental Impact Report ("Draft EIR") under CEQA. 6 AR 1395. Matrix thereafter revised the project to consolidate its site activities on a single pad of approximately 6.9 acres, reducing the impacted area, and in April 2011 submitted a revised CUP application. 8 AR 1727.

14. Description of the Revised Project

The revised project is sited on a single, centrally located 6.9 acre area located on the Chevron Tract. 9 AR 2136. The project allows for the use of three existing access roads (totaling 8.6 acres) to access the project site. Ibid. The project also requires 7.6 acres of permanent fuel modification zone.[6] 13 AR 2805. Surface access for the project is limited to the Chevron Tract; there is no surface access to the Unocal Tract. *See* 15 AR 3386.

The project involves three distinct phases. 10 AR 2215. Phase One is a drilling and testing phase in which three test wells would be drilled to assess the quality and quantity of oil and natural gas produced. Ibid. Phase Two, a construction phase, would involve construction of wells, installation of gas and oil processing equipment, and crude oil transportation facilities. Ibid. It is expected to continue for two years and ends with the completion of improvements to the North Access Road. 10 AR 2241. Phase Three allows for drilling the remaining wells (up to 60 wells) and for project operations and maintenance. 10 AR 2215.

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[5]The Habitat Authority's biologist consultant advised in April 2008 that the proposed oil drilling project contradicts the vision and mission of the Core Habitat Zone, the RMP, and the "biological, usage and aesthetic goals" of the land managed by the Habitat Authority. 5 AR 1190-91, 1197.

[6]A fuel modification zone is a strip of land where combustive vegetation is modified or replaced with drought tolerant, low-fuel-volume plants to reduce fire risks. 10 AR 2216.

15. The FEIR

Whittier revised the Draft EIR to account for the revised project, and circulated the Draft EIR for public review and comment from June 6, 2011 to July 21, 2011.

Whittier did not receive any comment letter from MRCA or SMMC. Whittier did receive a comment letter from the District opining that it was a "responsible agency" under CEQA and that its consent was required for the use of lands purchased with Prop.. A funds. 11 AR 2422.

Whittier's response to comments was that the District was not a responsible agency:

> ". . . [T]he District has no discretionary authority under Proposition A that would appear to classify it as a responsible agency under CEQA Guideline 15381. It is clear from Proposition A that the Whittier would be required to either reimburse the District for the area to be used the Proposed Project, or provide a comparable area of land that can be used for open space." (11 AR 2538).

The response also noted that Whittier's purchase of the property with Prop. A funds raised a legal issue separate and apart from the environmental issues analyzed in the Draft EIR, and the project would not go forward unless the property may be used for oil extraction consistent with the legal requirements under Prop. A. 11 AR 2538.

Thereafter, Whittier prepared a Final EIR ("FEIR"). The FEIR stated that the project site, pipeline routes, and access roads are predominately located within the Preserve's Core Habitat Management Zone, an area currently (1) set aside for the sole purpose of providing undisturbed habitat for wildlife (2) well-buffered from "edge effects" such as lighting, noise, and intrusions by humans and domestic animals; and (3) characterized as a "native wildlife nursery site" for such species as the mule deer and bobcat. 10 AR 2314.

The FEIR acknowledged that the project would result in significant and unavoidable impacts to the open space and wildlife which cannot be mitigated, including: (1) impacts on air quality from emissions during construction, operations and drilling (9 AR 2139); (2) impacts on aesthetics and visual resources due to the proximity of recreational trails and other areas to the oil field operations and the drilling rigs (9 AR 2140); (3) impacts to surface and groundwater will occur from a rupture or leak of crude oil from drilling, operations or pipelines (9 AR 2142); (4) impacts to land use and policy consistency, including open space impacts, noise impacts and the visual impacts (9 AR 2142-43); (5) impacts to recreation due to views from trails and the closure of the Arroyo San Miguel Trail (9 AR 2143); and (6) impacts to the Core Habitat Zone where the project is located, including loss of sage brush and other endangered vegetation, roadkill from access roads, and increased levels of noise, light, human presence and vehicle traffic. (9 AR 2314).[7]

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[7]County expert Marie Campbell also opines on the environmental impacts which cannot be mitigated. According to Ms. Campbell, the project will substantially interfere with the use of the Whittier Hills Prop.erty as open space and wildlife habitat and will result in significant direct and indirect adverse impacts to 335 acres of the Whittier Hills Property. Camp. Decl., ¶'s 31,32. Ms. Campbell also opines that there is a better alternative location for the project at the Savage

The FEIR also stated that Whittier's use of Prop. A funds for acquisition of the Tracts required it "to obtain consent of the [District] for certain proposed uses or development of the land for anything other than public open space or recreational use." 9 AR 2134.

16. Whittier's Approval of the Project

The FEIR and the CUP were considered by Whittier's Planning Commission and City Council during approximately 32 hours of public hearings spanning several weeks. *See* 12 AR 2765-67. No representatives of either MRCA or SMMC spoke at any of the hearings.

In a staff report prepared for the November 15, 2011 Whittier Council meeting, Whittier explained its position on Prop. A compliance:

> "Several commenters have raised issues regarding the requirement that the [District] 'release' the project site lands from Proposition A restrictions. As discussed below, this language means that the District must be financially compensated for the land that was purchased with Proposition A funds or be provided replacement funds. As part of its 'release' of the lands, the District does not issue a CUP or otherwise approve the project. The District does not have a process for issuing CUPs, and would not have the authority to issue such a permit within Whittier's jurisdiction in any event." As to the release from Proposition A restrictions, that process is underway. (12 AR 2749).

The staff report also concluded that the project would not violate the public trust doctrine. The report noted that municipalities have broad discretion in negotiating the sale or lease of land without violating the public trust doctrine. Case law had upheld the lease of a small part of a park to be used for a hotel where the rest of the park continues to be used as a park, citing Harter v. City of San Jose, (1904) 141 Cal. 659. 12 AR 2751. As the FEIR stated, the lease area is a small fraction of the Preserve, and Whittier's objectives for the project included obtaining an income stream to maintain the Preserve and the Habitat Authority. Ibid. As such, the situation was similar to Harter and the project did not violate the public trust doctrine. Ibid.

On November 28, 2011, the Whittier City Council unanimously voted to certify the FEIR and approve the CUP. The Resolution found, *inter alia*, that "there are no existing conservation easements placed on the property that would prohibit" the project, the proposed project would not violate the public trust doctrine, and the project is not prohibited by Prop. A. 12 AR 2770. The approval was subject to 90 conditions of approval,[8] which included a requirement that a conservation easement be placed over the entirety of the Whittier-owned Preserve land, excepting only the surface areas approved for use in the project through the CUP. 12 AR 2802.

Whittier filed a Notice of Determination on November 29, 2011. 14 AR 3081. No legal challenge was made to the FEIR or CUP.

Canyon Landfill site. Camp. Decl., ¶35.

[8]Respondents cite to AR Volume 17 for this fact. The court does not have a Volume 17.

17. Communications Between Whittier and the District Concerning Prop. A

Prior to awarding the Lease in October 2008, the City began discussions with the District to "determine the appropriate approach to compliance with Proposition A." *See* 6 AR 1203.

Whittier obtained a legal opinion letter on February 5, 2009, stating: "The City considers the Lease to be a disposition of the Whittier Hills Property which will render the use of seven acres thereof incompatible with Proposition A purposes." 6 AR 1392. The letter opined that "both Proposition A and the Project Agreement require that the City reimburse the District for the loss for Proposition A use of approximately seven acres of real property..." 6 AR 1394.

The District did not respond for nearly one year. When it did respond on January 6, 2010, the District Director's letter took issue only with the form of calculation for reimbursement. 7 AR 1581-83. The letter made no suggestion the District must consent to the Lease or that the City must seek the District's approval for the disposition of property.

Whittier replied on October 26, 2010, acknowledging the District's position that the proceeds from oil drilling could be used for Whittier's park and recreation purposes outside the boundaries of the two Tracts, and discussing how to calculate the value of the acres whose use will be changed and whether Whittier could substitute other open space land for the affected seven acres. 7 AR 1517-18.

The District's next communication with the City was its December 6, 2010 comment letter on the Draft EIR in which the District claimed to be a responsible agency under CEQA by virtue of Prop. A, and stated that Whittier must use non-recreational gross income for recreational development unless the District consents otherwise (10 AR 2408). The District did not claim that Whittier was required to obtain District consent for the Lease.

Both the County and District were named as defendants in a related lawsuit, Open Space Legal Defense Fund, et at. v. City of Whittier, et at., ("Open Space") LASC No. BS128995, filed on December 23, 2011. In Open Space, the petitioner sued Whittier, the County, and the District, also naming Matrix as a real party-in-interest. The case challenged the project's CUP and FEIR. In a December 14, 2010 demurrer, the County argued: "Proposition A and the Whittier/District Agreement both contemplate and provide for the lease of the land and for the disposal of the land. The Public Trust Doctrine allows for commercial and industrial use on public trust lands, including oil and gas extraction activities." 7 AR 1666.[9]

The District's comment letters on the revised Draft EIR in May and July 2011 continued to characterize the Lease as a disposition of Prop. A land, contended that the District was a responsible agency under CEQA, and made no claim that its consent was required for Whittier to dispose of Prop. A lands. 10 AR 2358, 2365. The FEIR's response to these comments is discussed *supra*.

On December 22, 2011, after its approval of the project, Whittier wrote to the District, acknowledging that Prop. A "requires we compensate the District pursuant to the terms and provisions of Section 16b of Proposition A [but] [t]o date, we have not been able to get the District's agreement as to a process to allow that compensation amount to be calculated so that the City can make the required payment." 14 AR 3086. Whittier noted that the District had taken

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[9]Open Space settled on October 30, 2012 with a monetary payment to the petitioner from Matrix. 15 AR 3491, 3494.

the position that the property could only be appraised after certification of the FEIR, Whittier had been asking to begin that appraisal process since 2008, and the District had failed to respond. 14 AR 3087.

On May 9, 2012, Whittier tendered a check for $325,000 to the District for the 22.1 acres of land determined by the FEIR to be impacted (including temporary impacts) by the project as compliance with its Prop. A obligations. 14 AR 3239-40. The District returned the check on June 6, 2012, stating that it would be premature to accept payment in light of the ongoing litigation and the issues raised in Whittier's letter. 14 AR 3279.

18. The Lease Amendments

On May 8, 2012, the Whittier City Council considered and approved a proposed amendment to the Lease removing two provisions which required Matrix to obtain a release of protected area status through a CUP issued by the District in order to commence the project and for any additional drill sites Matrix requested. 14 AR 3199. Whittier staff explained that these Lease requirements were unnecessary because the District does not have a CUP process. 14 AR 3178. Without the Lease amendment, Matrix could not begin work under the CUP. *See* AR 3241.

The County did not provide any written or oral comments in connection with this action or otherwise object to it. Both MRCA and SMMC objected to this action at the City Council Meeting. 14 AR 3188.

On June 19, 2012, the Whittier City Council approved and accepted an Amendment and Partial Release of Declaration and Easement of Restricted Use (the "Chevron Release") relating to the Chevron Declaration. The Chevron Release expresses the intent "to release those portions of the Project within the Restricted Property from the covenants and restrictions set forth in the [Chevron Declaration] dated December 19, 1995." 15 AR 3371. The Chevron Release obligated Whittier to create a conservation easement within four years over the remaining Preserve acreage, as described in Condition No.74 of the CUP. 15 AR 3371. The Release required Whittier to seek from Chevron an amendment to the Chevron Declaration releasing the Declaration from the Restricted Property and substituting the new conservation easement.[10] Ibid.

MRCA and the SMMC again objected. 14 AR 3280-81. The County did not provide any written or oral comments in connection with this action.

19. Whittier's Commitment of Lease Revenue

On August 24, 2012, Whittier executed a Royalty Funding Agreement with Habitat Authority agreeing to pay 4% of royalties it receives from the Lease up to an annual maximum of $2 million to be used by Habitat Authority's operations. AR 15 3462-63.

On November 13, 2013, Whittier established a subcommittee to make recommendations for the management of all revenues from the Lease in order to provide an Endowment Trust Fund to meet the needs of Whittier and to provide a "safety net" to Whittier. 16 AR 3626-27. Whittier

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[10]The Restricted Property was 600 acres in size. The Chevron Release removed approximately 18 acres from the restricted area and sought Chevron's agreement for this release and substitution of a new restricted area for conservation easement.

has placed Lease revenues in its general fund, and committed funds from that revenue to hire a law firm to set up the Endowment Trust. 16 AR 3659, 3685.

C. Standard of Review

This lawsuit contains claims for mandamus, breach of contract, breach of public trust, and declaratory relief. The court decides the breach of contract, breach of public trust, and declaratory relief claims as the trier-of-fact.

The Cross-Petition makes a CEQA challenge to a quasi-judicial action taken by Whittier in approving the Lease amendments without further environmental review. There was no hearing required by law for this decision, and Whittier's action is reviewed under traditional mandamus. *See* Bunnett v. Regents of the University of California, (1995) 33 Cal.App.4th 843, 848; Royal Convalescent Hospital v. State Board of Control, (1979) 99 Cal.App.3d 788, 794. Public entities abuse their discretion if their actions or decisions do not substantially comply with the requirements of CEQA. Sierra Club v. West Side Irrigation District, (2005) 128 Cal.App.4th 690, 698. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Western States Petroleum Assn. v. Superior Court, (1995) 9 Cal.4th 559, 568; Pub. Res. Code §21168.5.

The remaining mandamus claims concern breach of Prop. A and breach of the public trust doctrine. Again, there was no hearing required by law and these alleged breaches of duty are traditional mandamus. A traditional writ of mandate is the method of compelling the performance of a legal, ministerial duty required by statute. *See* Rodriguez v. Solis, (1991) 1 Cal.App.4th 495, 501-02. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance." Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

D. Nature of the Claims

Respondents correctly point out that Petitioners' opening brief fails to distinguish their respective claims. Opp. at 14. Respondents conclude that any challenge to the project, the CUP, the Lease amendments, or the Chevron Release must be made through mandamus. Ibid.

This is erroneous. With respect to MRCA, the FAC states breach of contract claims (damages and specific performance) for breach of the MRCA/Whittier and the Chevron Declaration. The FAC also contains a cause of action for declaratory relief based on these agreements. Only the FAC's cause of action for violation of Prop. A and breach of the public trust doctrine lie in mandamus.[11]

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[11]The portion of the FAC's declaratory relief claim based on Prop. A and the public trust doctrine is subsumed within this mandamus claim. The FAC also purports to contain a cause of action for injunction, but injunctive relief is a remedy, not a cause of action.

The District's Cross-Complaint sets forth a breach of contract claim (specific performance) for breach of the Project Agreement. It also seeks declaratory relief based in part on the Project Agreement and the Procedural Guide. Only the causes of action for breach of Prop. A and the public trust doctrine and violation of CEQA lie in mandamus.[12]

SMMC's Complaint alleges a claim for violation of Prop. A, which lies in mandamus. The Complaint also includes a cause of action for declaratory relief based on the Prop. A violation, but that is subsumed within the mandamus claim.[13]

E. Standing

1. The May 8, 2012 Lease Amendment

Respondents contend that no Petitioner has standing to challenge the May 8, 2012 Lease amendment, which deleted the requirement that Matrix obtain a District-issued CUP, because it simply is a contract between Whittier and Matrix and members of the public are merely incidental beneficiaries of that contract. *See* Unite Here Local 30 v. Department of Parks & Recreation (2011) 194 Cal. App. 4th 1200, 1217 (union and taxpayer did not have standing to challenge recreation department's approval of an assignment of a concession contract where they were merely incidental beneficiaries).

The short answer is that no Petitioner has standing to sue for breach of the May 8, 2012 Lease amendment, and none purports to do so. They cite the amendment as evidence of Whittier's breach of legal duties stemming from other sources – Prop. A and the Project Agreement.

2. The Chevron Release

Respondents contend that all parties lack standing to challenge the June 19, 2012 Chevron Release. They note that the County and SMMC have never held title to the Chevron Tract. MRCA held title briefly, but has no current interest in the Tract and Respondents contend that MRCA is a mere intruder. *See* Civil Code §1105 (presumption that fee simple passes from grant of real Prop.erty) Civil Code §1107 (grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him). Respondents acknowledge that an exception exists where a grantor reserves to itself the right to enforce restrictions, and that Chevron did so and MRCA did not. Opp. at 19.

Again, no Petitioner makes a claim based on breach of the Chevron Release. MRCA contends that the Chevron Release is evidence of a breach by Whittier of the Chevron Declaration, a document to which MRCA is a Grantee.

MRCA has standing to allege breach of the Chevron Declaration.

F. Statutes of Limitations

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[12]The portion of the declaratory relief cause of action based on the public trust doctrine and documents to which the District is not a party – Prop. A, the Chevron Declaration, the Unocal Declaration, and CEQA – is subsumed within the mandamus claims.

[13]The Complaint also purports to allege the remedy of injunction as a cause of action.

1. Section 65009

Respondents argue that the challenges to the project by the District (defined *post* as including the County) and SMMC are time-barred under Govt. Code section 65009 ("section 65009"). Respondents note that Whittier approved the Lease and the CUP on November 28, 2011. Any challenge to the CUP was required to be filed and served within 90 days. SMMC waited over eight months, and the District waited eleven months, to sue. Both suits are untimely, and both SMMC and the County are barred from challenging the project on any legal theory. Opp. at 14-15.[14]

Section 65009 sets a short, 90-day limitations period for filing and serving a petition challenging various land use decisions, including the issuance of conditional use permits, variances, and other permits.[15] Travis v. County of Santa Cruz, ("Travis") (2004) 33 Cal.4th 757, 767; Honig v. San Francisco Planning Dept., ("Honig") (2005) 127 Cal.App.4th 520, 526;. Section 65009(a)(3) expressly provides, in part: "The purpose of this section is to provide certainty for property owners and local governments regarding decisions made pursuant to this division." The legislative intent for this provision "is to establish a short limitations period in order to give governmental zoning decisions certainty, permitting them to take effect quickly and giving property owners the necessary confidence to proceed with approved projects." Wagner v. City of South Pasadena, ("Wagner") (2000) 78 Cal.App.4th 943, 948-949. Strict compliance with the limitations period is required. Wagner, *supra*, 78 Cal.App.4th at 950; *see* Govt. Code §65009(e).

Application of a statute of limitations depends on the gravamen of the cause of action. Honig, *supra*, 127 Cal.App 4th at 524; Hensler v. City of Glendale, (1994) 8 Cal.4th 1, 22. In Honig, the California Supreme Court held that the 90-day statute applied to "a writ petition challenging issuance of a building permit issued in conjunction with a zoning variance, if the gravamen of the petition is that the *variance* was improperly granted." Honig, *supra*, 127 Cal. App. 4th at 524 (emphasis in original).

The court agrees that SMMC and the District are time-barred from challenging the CUP on any legal theory. The question is whether the gravamen of either parties' challenge is to the CUP.

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[14]Respondents concede that MRCA's challenge is timely. *See* Opp. at 15.

[15]Gov. Code section 65009(c)(1) provides:

"Except as provided in subdivision (d), no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: ....

(E) To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit."

The District's breach of contract and declaratory relief claims are based on the Project Agreement, not the CUP. The limitations period for contract actions is four years. CCP §337. The CEQA claim is not based on the CUP either, but rather an alleged failure to perform a supplemental environmental review for the Lease amendments, which occurred after the CUP.[16] Respondents do not argue that the District's Cross-Complaint is untimely under CEQA.

The District's remaining mandamus causes of action are for breach of Prop. A and the public trust doctrine. The gravamen of the Prop. A claim is that Whittier breached its public duty under Prop. A by approving the project on November 28, 2011, including the certification of the FEIR and approval of the CUP, when it had previously (1) purchased the Chevron and Unocal Tracts with Prop. A funds, and (2) recorded the Chevron Declaration and Unocal Restrictive Declaration, both of which imposed perpetual conservation easements.

The gravamen of the public trust claim is that Whittier created a public trust when it purchased the Chevron and Unocal Tracts with Prop. A funds, as well as by entering into the Chevron Declaration and Unocal Restrictive Declaration, both of which imposed perpetual conservation easements. Any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto would constitute an *ultra vires* act. *See* Save the Welwood Murray Memorial Library Com. v. City Council, (Welwood") (1989) 215 Cal.App.3d 1003, 1017. Whittier's November 28, 2011 approval of the project, including the FEIR and CUP, were attempts to divert the Tracts from their public trust use.

Thus, the gravamen of both the Prop. A and public trust doctrine claims is that Whittier breached both of them when it approved the project. Whittier's action in entering into the Lease and issuing the CUP was a land use decision, and any mandamus attack on it had to be filed within 90 days of November 28, 2011 under section 65009. The District's October 25, 2012 Cross-Petition was untimely.

Petitioners argue that Whittier's alleged failure to comply with a duty imposed by law is neither an "action" nor a "decision" under section 65009, and the 90-day limitations period does not apply. For this argument, they rely on Urban Habitat Program v. Pleasanton, ("Urban Habitat") (2008) 164 Cal.App.4th 1561, 1576-79.

In Urban Habitat, the petitioner claimed that state law required the city to pass a housing element as part of its general plan which was designed to make adequate provision for low-income housing needs. 164 Cal.App.4th at 1567. Although a city consistently asserted that the number of low-income housing units that could permissibly under a local voter-imposed housing cap, this assertion allegedly was false and the city complied with the housing cap, not state law. Id. at 1568. The court found that section 65009's limitation period was not triggered by these claims because they did not challenge a specific action by the city. Id. at 1576. Section 65009 is only triggered by specific acts concerning local land use decisions. Because the petitioner's claims were not brought as to "actions taken" by the city, the limitations period did not apply.

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[16]Because the District is alleging that Whittier failed to perform a supplemental review in entering into the Lease amendments, Respondents' argument that the District's CEQA challenge is a time-barred collateral attack on the conclusively valid FEIR is not well taken. *See* Opp. at 20.

Ibid. Instead, the more general three year limitations period in CCP section 338 -- which applies to an action upon a liability "created by statute, other than a penalty or forfeiture "-- applied. Ibid.

Urban Habitat relied on the California Supreme Court's decision in Travis, *supra*, 33 Cal.4th at 772, which held that section 65009's limitation does not govern a county board's failure to repeal an ordinance to conform to a state law adopted after the ordinance. Urban Habitat concluded that Travis stands for the general proposition that a challenge to a local government's decision based on events that occurred after that decision took place and could not have been brought during the statutory time limits, is not governed by section 65009. 164 Cal.App.4th at 1577. Urban Habitat relied on this principle to conclude that section 65009 did not apply to the petitioner's claims, which only arose over the passage of time and not when the local requirements were passed. Id. at 1578.

Urban Habitat is distinguishable. Unlike Travis, no state law was passed after Whittier's action to make it unlawful. Prop. A and the Chevron Declaration existed long before the City entered into the Lease and the Lease amendments. Unlike Urban Habitat, Whittier did make a specific action in entering into the Lease and the Lease amendments, and there was no gradual accrual of a claim over the passage of time after the 90-day period in section 65009 had passed.

The District's Prop. A and public trust doctrine mandamus claims are time-barred. SMMC's August 6, 2012 Prop. A and public trust doctrine claims are untimely for the same reason. MRCA's claims are timely.

2. The FEIR Does Not Bar the Breach of Public Trust Claims

Respondents also argue that Petitioners' breach of public trust claims are barred by the conclusive validity of the FEIR. Respondents allege that the public trust doctrine must be based on statute where not concerning common law protection for state water resources, citing Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection, ("EPIC") (2008) 44 Cal. 4th 459. The pertinent statutory duty can only be Whittier's duty under CEQA to Prop.erly evaluate the project's environmental impacts, and a CEQA challenge to the FEIR is indisputably untimely. Opp. at 20. Any attempt to challenge the FEIR now through a public trust doctrine claim is an impermissible collateral attack, citing Citizens for East Shore Parks v. California Lands Commission, ("Citizens") (2011) 202 Cal.App.4th 548. Opp. at 21.

This argument fails on both of its foundations. First, it is not true that the public trust doctrine may only be based on statute. The California Supreme Court in EPIC agreed with the Court of Appeal that the petitioner had invoked the public trust doctrine based on the government's common law duty to take the public trust into account in the planning and allocation of water resources, as well as on a public trust duty derived from statute. 44 Cal.4th at 515. The EPIC court merely was noting the source of government duty, and did not conclude that statutory and common law water resource allocation are the only sources of a public trust duty.

Quite clearly, a government duty to the public may arise from other sources, including potentially a contract. Petitioners allege that the source of Whittier's public trust duty is Prop. A and the Chevron Declaration. These are adequate sources of duty for the public trust doctrine.

Second, it is not true that a public trust claim is necessarily barred where CEQA review is

final. In Citizens, a group challenged a city's approval of a 30-year lease which allowed Chevron to continue to operate a marine terminal sited on submerged land owned by the state and subject to a public trust. The court found that the CEQA evaluation of the project's impact was sufficient consideration for public trust purposes as well. 202 Cal.App.4th at 577.

Unlike Citizens, Petitioners are not using the public trust doctrine to challenge project impacts adequately covered by CEQA. Instead, they are challenging Whittier's actions as violations of public trust which were not addressed in the FEIR. The FEIR expressly stated that the project's compatibility with Prop. A is a legal issue separate and apart from the environmental issues addressed in the Draft EIR. Petitioners now present the Prop. A legal issue, as well as a claimed breach of the Chevron Declaration, in their public trust challenge. The finality of the FEIR does not bar the public trust doctrine claim.

G. Exhaustion of Administrative Remedies

1. The District

Respondents argue that the District failed to exhaust its administrative remedies for its CEQA challenge to the May 8, 2012 Lease amendment and the Chevron Release. Opp. at 17, 20.

It is a well-settled rule of law that where an administrative remedy is provided, relief must be sought from the administrative body, and the remedy exhausted before the courts will act. *See, e.g.*, Eight Unnamed Physicians v. Medical Exec. Comm. Of the Med. Staff of Washington Township Hosp., (2007) 150 Cal.App.4th 503, 510-511. Further, the administrative body must reach a final decision on the merits of the entire controversy. Exhaustion of administrative remedies is a jurisdictional prerequisite, not a matter of judicial discretion. McHugh v. County of Santa Cruz, (1973) 33 Cal.App.3d 533, 538. This doctrine effectively bars the pursuit of a judicial remedy by a person to whom an administrative action was available, but who has failed to commence such action, and, in the alternative, is seeking judicial redress. Citizens for Open Gov. v. City of Lodi, (2006) 144 Cal.App.4th 865, 874.

CEQA provides an exhaustion requirement where a petitioner must object to the project during the public comment period or to the close of public hearing before a notice of determination is filed. Pub. Res. Code §21177(b).[17] Where no notice of determination is filed, a petitioner still must exhaust administrative remedies by objecting to the project so long as he or she is given the opportunity to do so at a public hearing before the project is approved. Tomlinson v. County of Alameda, (2012) 54 Cal.4th 281, 290. *See* Opp. at 17.

Whether the District exhausted its administrative remedies for the CEQA claim turns on the meaning of "public hearing." Exhaustion for a CEQA claim is not required where there is no administrative remedy provided and where no public hearing occurs. Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster (1997) 52 Cal. App. 4th 1165, 1209-11. The District did not appear at either the May 8 or June 19, 2012 Whittier City Council meetings to object to the two amendments. But neither meeting qualified as a public hearing. A regularly

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[17]Pub. Res. Code 21177(b) states: "A person shall not maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the filing of the notice of determination pursuant to Sections 21108 and 21152."

scheduled city council meeting is not a public hearing on the project for CEQA exhaustion purposes. Concerned McCloud Citizens v. McCloud Community Services District, (2007) 147 Cal.App.4th 181, 189-90.[18]

2. MRCA

Respondents admit that MRCA timely challenged the CUP, but argue that MRCA failed to exhaust its administrative remedies in doing so because it never submitted any comments on the Draft EIR and never objected orally or in writing to the CUP. Opp. at 15.

MRCA's FAC contains no direct challenge to the CUP. As stated *post*, it has breach of contract claims (damages and specific performance for breach of the MRCA/Whittier and the Chevron Declaration, a declaratory relief claim based on these agreements, and mandamus causes of action for violation of Prop. A and breach of the public trust doctrine. Only the mandamus claims are challenges to the CUP.

MRCA is correct that issue exhaustion is all that is required for the mandamus claims. Section 65009(b)(1) provides that, in an action attacking a CUP, the issues are limited to those raised before the agency, except where the petitioner could not have raised the issue in the exercise of due diligence or was prevented by the agency from raising it. This means that so long as some party argued that Whittier's actions would breach Prop. A and the public trust doctrine, the exhaustion requirement was satisfied. Other commenters did so. *See* 12 AR 2749-51.[19]

H. Violation of Prop. A

All Petitioners contend that Whittier has violated Prop. A by not obtaining the District's consent for the Lease with Matrix. As discussed *post*, the Prop. A claims of the District and SMMC are time-barred. MRCA is the only Petitioner which can raise this claim.

The purpose of Prop. A is to acquire, restore and preserve parks, wildlife and open space resources. The District was created at the same time as Prop. A's passage. Prop. A provides that the District shall take all actions necessary and desirable to carry out Prop. A's purposes.

Prop. A section 16(b) expressly contemplates that property acquired with Prop. A funds

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[18]Petitioners argue in reply that an exception to the exhaustion requirement exists where it would be futile. *See* Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834 (exhaustion of administrative remedies excused when the aggrieved party can positively state what the administrative agency's decision in his particular case would be). MRCA did appear and object at both hearings, and the District argues that Whittier would have overruled a District objection on the same ground. However, the futility exception applies to the court-created exhaustion requirement. CEQA's exhaustion requirement is statutory, and not based on common law. It requires without exception that a petitioner take part in the administrative process and object to the project. Pub. Res. Code §21177(b).

[19]Respondents also have not shown that Whittier complied with the notice requirements of section 65009(b)(2) in order to rely on issue exhaustion. *See* Kings County Farm Bureau v. City of Hanford (1990) 221 Cal. App. 3d 692, 740-41 (exhaustion not required where government agency did not comply with statutory mandate).

might be sold or disposed of, and sets forth the obligations generated when an owner disposes of property purchased with these funds:

> "If the use of the property acquired through grants pursuant to this order is changed to one other than a use permitted under the category from which the funds were provided, or the property is sold or otherwise disposed of, an amount equal to the (1) amount of the grant, (2) the fair market value of the real property, or (3) the proceeds from the portion of such property acquired, developed, improved, rehabilitated or restored with the grant, whichever is greater, shall be used by the recipient, subject to subdivision a of this Section, for a purpose authorized in that category or shall be reimbursed to the Parks Fund and be available for appropriation only for a use authorized in that category."
>
> "If the property sold or otherwise disposed of is less than the entire interest in the property originally acquired, developed, improved, rehabilitated or restored with the grant, an amount equal to the proceeds or the fair market value of the property interest sold or otherwise disposed of, whichever is greater, shall be used by the grantee, subject to subdivision (a) of this Section, for a purpose authorized in that category or shall be reimbursed to the Parks Fund and be available for appropriation only for a use authorized in that category. Nothing in this Section 16 shall limit a Public Agency from transferring property acquired pursuant to this order to the National Park Service or the State Park System, with or without consideration."
> (1 AR 261).

Petitioners argue that section 16(b) does not authorize Whittier or any grantee to make a unilateral decision to sell or lease property acquired with Prop. A funds. They contend that section 16(b) merely prescribes how the proceeds from any such transaction are to be used if the transaction has been approved by the District. Petitioners argue that this interpretation of section 16(b) properly harmonizes it with section 16(a), and preserves the District's authority to "take all actions necessary and desirable to carry out the purpose of" Prop. A. (Prop.. A, §29). They further contend that this construction also is consistent with the voter's intent to preserve open space and avoids an absurd result where the District would have no right to oversee any change in use or disposition of Prop. A property, even one wholly inconsistent with Prop. A's purpose. Their construction also avoids setting a precedent for a city to unilaterally lease or sell open space acquired with Prop. A funds, which would adversely impact land conservation efforts in the County. Op. Br. at 24-26.

When interpreting a voter initiative, the courts apply "the same principles that govern statutory construction" and consider the "initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole[.]" Professional Engineers in California Government v. Kempton, (2007) 40 Cal.4th 1016, 137; People v. Superior Court (Pearson), (2010) 48 Cal.4th 564, 571).

The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of the language and seeking to avoid making any language mere surplusage. Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724. Significance, if possible, is attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Orange County Employees Assn. v. County of Orange, (1991) 234 Cal.App.3d 833, 841. The various parts of a statute must be harmonized by considering each particular clause or section in the context of the statutory framework as a whole. Lungren v. Deukmejian, (1988) 45 Cal.3d 727, 735.

The enactment must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intent of the lawmakers, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity. To that end, the court must consider, in addition to the particular language at issue and its context, the object sought to be accomplished by the statute, the evils to be remedied, and public policy. Lungren v. Deukmejian, *supra*, 45 Cal. 3d at 735.

Prop. A section 16(a)(1) requires the recipient of Prop. A funds to "maintain and operate in perpetuity the property acquired, developed, improved, rehabilitated or restored with the funds" and this responsibility may only be transferred "with the approval of the granting agency [i.e. the District]." As Respondents argue (Opp. at 25), the plain language of section 16(a)(1) does not prohibit the sale or disposition of property obtained with Prop. A funds. It only precludes the transfer of responsibility for operating or maintaining such property without District approval. For example, if a city attempted to contract with a vendor for a snack shop on Prop. A land, the city would need the District's approval.

Section 16(b) contemplates, in its first paragraph, a change in use or sale of the entire Prop. A property and payment by the grantee property owner for more Prop. A property or reimbursement of the District's Parks Fund. In its second paragraph, section 16(b) contemplates a disposition of less than the entire amount of Prop. A property and payment by the grantee property owner for more Prop. A property or reimbursement of the District's Park Fund. Thus, the entire section 16(b) concerns the use of funds to acquire other Prop. A property or reimburse the District's Park Fund. Section 16(b) does not say who makes the decision to change the use or dispose of Prop. A property. The provision is only about what happens when the change in use or disposition occurs.

As a result of the fact that the provision does not say who makes the decision on change of use/disposition, there is an ambiguity. Arguably, the failure of section 16(b) to address expressly who decides means that the property owner agency makes that decision. To require District consent for such a decision would , as Petitioners contend, read additional language into the Proposition. This the court should not do unless the overall purpose of the initiative so requires.

Prop. A's purpose is to acquire, restore and preserve parks, wildlife and open space resources. This general purpose is served by the acquisition and operation of qualifying property -- any qualifying property. If Prop. A funds are put to this use, it does not matter what qualifying property is acquired. So, if Whittier sold or leased the Tracts, this purpose would be served where either Whittier or the District, through reimbursement of the Park Fund, acquired other qualifying property with the proceeds. As Respondents argue, general statutory law concerning

the right of a city owning open space (Pub. Res. Code §5541), and Whittier's police power support this view. *See* Candid Enterprises, Inc. v. Grossmont Union High School District, (1985) 39 Cal.3d 878, 885.

However, Prop. A was not just a general funding mechanism for the acquisition of qualifying property. It also allocated fund amounts to various agencies for specific purposes. 3 AR 252-57. Thus, in section 6(b)(2), Prop. A allocated $204,850,000 for direct grants to cities in accordance with a detailed schedule. 3 AR 254. These grants were for specific projects. For example, section 6(b)(2)(R) allocated $500,000 to the City of La Habra heights for the restoration and improvement of hacienda Park. 3 AR 255. Whittier itself was allocated $9.3 million in section 6(b)(2)(QQ) "for the acquisition of natural lands and development of related facilities in the Whittier Hills." 3 AR 257.

In light of these specific allocations, Petitioners are correct that it would be absurd if the District did not control any change in use or disposition of Prop. A property. Specific allocations were made in Prop. A for the purchase of properties which should be purchased by Whittier and other cities. These properties were identified within general boundaries. Prop. A also required the District to take all actions necessary and desirable to carry out Prop. A's purposes. The District cannot carry out the purpose of ensuring that specific listed properties are preserved as open space if it does not control disposition of the properties. If a city could acquire the enumerated property with allocated Prop. A funds, sell the property after a few years, and then buy other open space land, the County's citizens would be left without the property identified in Prop. A for which they approved a property tax assessment. This result should happen only if the District, the entity charged with ensuring adherence to Prop. A's purposes, approves.

In order to ensure Prop. A's specific purpose of restoring and preserving parks, wildlife and open space resources in identified areas, section 16(b) must be interpreted as permitting a change of use or disposition of property acquired with Prop. A funding only where the District consents. Such an interpretation is consistent with purpose of the voters, will result in wise policy rather than mischief or absurdity, and achieves the object sought of obtaining open space and park land in specified areas.

Whittier violated Prop. A by not obtaining the District's consent before entering into the Lease. MRCA is entitled to mandamus on this claim.[20]

I. Breach of the Project Agreement

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[20]Respondents argue that the County admitted that section 16(b) permits Whittier to unilaterally change the use or dispose of Prop. A property in its Open Space demurrer. *See* Opp. at 12. The court determined *post* that the District cannot raise the Prop. A claim, and this issue is moot.

In any event, the County's alleged judicial admissions with respect to this issue, the public trust doctrine, and the Project Agreement -- that Prop. A property may be developed through oil exploration without violating any -- do not reflect on the issue of consent. That is, this statement does not bear on whether the District must consent to such development. Moreover, the County's statements do not qualify as judicial admissions because they concern legal theories, not issues of fact. *See* Stroud v. Tunzi, (2008) 160 Cal.App.4th 377, 384.

1. The Breach

The District alleges that Whittier breached the Project Agreement. Respondents argue that the Project Agreement is consistent with Prop. A, and modifies section 16(b) only to the extent that it requires Whittier to reimburse the District without the option of replacing the land with other open space land. Opp. at 25 (citing 3 AR 517).

Section 9(A) of Prop. A requires all applicants for a grant of Prop. A funds, such as Whittier, to submit an application for approval. Whittier's Application and Assurances expressly required Whittier to (1) maintain and operate the property acquired with Prop. A funds in perpetuity, and (2) "use the property only for the purposes of the Proposition and [to] make no other use, sale or other disposition of the property except as authorized by the specific act of the Board of Supervisors as the governing body of the District." 3 AR 506 (emphasis added). Thus, Whittier represented in its Application that it would not enter into an oil lease without the District's consent.

Respondents argue that these representations were superseded by the Project Agreement. Opp. at 25. But the Project Agreement contains no integration clause. To the contrary, it states that Whittier's Application is incorporated by reference as though set forth in full. 3 AR 521. The Project Agreement, therefore, incorporates Whittier's assurance that it would not enter into the Lease without the District's consent.

In the Project Agreement, Whittier made additional and broader promises. It agreed (1) to maintain and operate in perpetuity property obtained with Prop. A monies, and to obtain District consent before transferring this responsibility (3 AR 520), (2) to use the property acquired with Prop. A monies only for the purpose for which it requested the grant, except as consented to by the District (3 AR 520), and (3) to submit proposed leases for "prior District review" for 20 years from the date of the Agreement (3 AR 516).

Whittier further agreed in the Project Agreement to comply with "The Proposition A Procedural Guide." 3 AR 521. This Guide expressly requires "prior District approval" for (1) any proposed lease agreement with a non-government entity and (2) any non-governmental use, operations, management or other activity on the site. 3 AR 299, 320.

Whittier breached the Project Agreement by entering into the Lease and approving the project without the District's consent. It does not matter whether the Lease is a change in use, as contended by Petitioners (Op. Br. at 27, Reply at 12) or a disposition of property, as contended by Respondents (Opp. at 25). The parties' contract requires that Whittier submit a lease to the District for its consent and obtain consent before any disposition of the Tracts acquired with Prop. A funds.[21]

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[21]Respondents argue that the a contractual restriction on Whittier's ability to dispose of the Tracts is void as an improper restriction on its police power. Opp. at 24. Respondents rely on Delucchi v. County of Santa Cruz (1986) 179 Cal. App. 3d 814, in which the court rejected a contract interpretation by private landowners that the county had agreed not to change its zoning laws, finding that the interpretation would infringe on the government entity's sovereign police powers. Id. at 821.

This argument is spurious. Whittier did not contract to freeze its zoning laws, or any laws. It contracted to be an owner of property, and its contract is just as lawful as any private property

Respondents argue that the parties' conduct show that District consent for the Lease and project is not required, pointing out that the District never has claimed a right to consent to the Lease or asserted a breach of the Project Agreement. The District only has claimed a right to consent to the use of non-recreational income generated from the property. Opp. at 25-26.

This is true, but has no bearing on the analysis. The District's breach of contract claim is not untimely, and Respondents make no argument of waiver or laches. They merely assert that the parties' conduct is consistent with their interpretation. But party performance is only relevant to clarify an ambiguity. There is no ambiguity in the assurances made by Whittier and incorporated in the Project Agreement.[22]

In sum, whatever the proper interpretation of section 16(b), the District was entitled to require an agreement from Whittier to obtain Prop. A funds which required consent to leasing the Tracts for oil production. Whittier breached the Project Agreement when it failed to submit the Lease to the District for approval.

2. The Scope of the District's Discretion

In deciding whether to consent to the Lease, the District undoubtedly may consider whether Whittier's project is consistent with Prop. A's purpose, a fact acknowledged in the FEIR. 11 AR 2538.

Petitioners argue that the District may also consider environmental issues associated with the FEIR under CEQA because the District is a responsible agency under CEQA and Guidelines section 15096 entitled to review the environmental issues addressed in the FEIR, including the impacts of drilling and the adequacy of mitigations. Op. Br. at 21-22.

A "responsible agency" is an agency, other than the lead agency, that issues some discretionary approval for a project. Guidelines §15381. Responsible agencies may use the EIR prepared by the lead agency to inform issuance of their own permits. City of Redding v. Shasta County Local Agency Formation Commission, (1989) 209 Cal.App.3d 1169.

Given that the District must consent to the Lease under Prop. A and the Project Agreement, it is a responsible agency. A responsible agency must consider the project's environmental effects as described in the FEIR (Guidelines §15096(f), and must adopt its own findings (Guidelines §15096(h)). In this case, the FEIR was not challenged. The District, therefore, must either be deemed to have waived any objection to the FEIR, prepare a subsequent EIR if permissible under Guidelines section 15162, or assume the lead agency role. Guidelines §15096(e)(2),(3), & (4).[23] If the District relies on the FEIR, it must decide for itself how to

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agreement.

[22]Respondents note that the Project Agreement further expressly contemplates the reimbursement of the District upon disposition of land purchased with Prop.. A funds, and does not require consent in that provision. Opp. at 25. This is true, but does not affect the Project Agreement's other provisions.

[23]Respondents argue that the District failed to challenge the FEIR, and is bound by it. Opp. at 18. As Guidelines section 15096(e) provides, the District's failure to challenge the FEIR

respond to those significant effects that will directly or indirectly result from the District's decision to approve the Lease. Guidelines §15096(g)(1). This evaluation is more circumscribed than the lead agency's evaluation; it has responsibility only for mitigating the environmental effects of those parts of the project which it decides to approve. Ibid.

In RiverWatch v. Olivenhain Municipal Water Dist, (2009) 170 Cal. App. 4th 1186, 1207, the court stated that "if a responsible agency approves all or part of a project without first considering an EIR that has been or is being prepared by the lead agency and without making required findings, the responsible agency has not complied with CEQA and its approval must be set aside."

The scope of the District's discretion includes whether the Lease/project comply with Prop. A and the environmental impacts of approval.

3. Equitable Remedies

The Project Agreement provides for specific performance in the event of a breach by Whittier, acknowledging that money damages would be insufficient. 3 AR 517-18.

Petitioners argue that Whittier's breach requires mandamus and injunctive relief, and specific performance of the Project Agreement. Op. Br. at 21. They argue that this relief is necessary because the District is a responsible agency under CEQA and Guidelines section 15096 entitled to review the environmental issues addressed in the FEIR, including the impacts of drilling and the adequacy of mitigations. Op. Br. at 22. Further, the District's right is enforceable through Civil Code section 815.7.[24] They contend that the disruption of the property through further drilling activity warrants an injunction until the District exercises its discretion. Op. Br. at 22-23.

Respondents make a series of arguments in opposition to equitable relief. First they argue that mandamus is not an available remedy. Opp. at 23-24. They are correct. Mandamus is not an appropriate remedy for enforcing a contractual obligation against an agency. 3000 DeHardo Street Investors v. Department of Housing & Community Development, (2008) 161 Cal.App.4th 1240, 1254. This is because breach of contract is an adequate remedy at law, and the duty which mandamus enforces is not the contractual duty of the entity, but the official duty of its officer or board. Ibid. Moreover, a public agency is as free to breach a contract during performance, with accompanying liability for doing so, as a private contracting person or entity. Id. at 1254-55.

Respondents also contend that equitable relief is not available to enforce the Project Agreement since it is barred by Gov. Code section 65009's limitations period for challenging CUPs. Opp. at 27. The court has addressed this limitations argument *supra*.

They further argue that the District has an adequate remedy at law -- reimbursement of

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may mean that it has waived any objection to the FEIR. However, the failure to object to the FEIR does not relieve the District of its responsible agency duties. Whether the District has timely met its responsible agency duties is not part of this lawsuit.

[24]Civil Code section 815.7(c) provides for a remedy of injunction for impairment of a conservation easement. However, the Project Agreement does not create, or create rights to, a conservation easement.

proceeds from the disposition of Prop A. property. Specific performance should only be available for the reimbursement remedy for property disposition discussed in the Project Agreement, a remedy Whittier and the District have been discussing for three and a half years. Opp. at 27-28.

Reimbursement would be an appropriate remedy if Whittier had breached the reimbursement provision of the Project Agreement. It is not a proper remedy for the breach of the District's right to consent. As Petitioners argue, "the District [should] be afforded the opportunity to exercise its discretion to approve or disapprove the [p]roject." Reply at 13. The only remedy that could be imposed for such a breach other than specific performance would be money damages, and the parties expressly agreed that money damages are inadequate.

Finally, Respondents argue that equitable relief is not available since the District has unclean hands. See Stein v. Simpson (1951) 37 Cal. 2d 79, 82-83. They point to the District's failure to accept Whittier's payment of reimbursement funds, which extinguishes Whittier's duty of performance under Civil Code 1485 ("An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent to extinguish the obligation.").

The short answer is that Whittier's tender of reimbursement was premature; it does not come into play until such time as the District consents to the Lease.[25]

The District (not any other Petitioner) is entitled to the remedy of specific enforcement of the Project Agreement's requirement that it consent to the Lease/project. This must include an injunction against the project during the time that the District performs its exercise of discretion. *See* City of South Pasadena v. Department of Transportation (1994) 29 Cal. App. 4th 1280 (upholding trial court injunction preventing CalTrans from building a freeway until it had an agreement from the city). Id. at 1284, 1296. The injunction will last until that exercise, or until the Project Agreement expires, which is June 2015. *See* Beatty Safway Scaffold, Inc. v. Skrable, (1960) 180 Cal.App.2d 650, 654.

J. Breach of the Chevron Declaration

MRCA's breach of contract claim is based on Whittier's breach of the Chevron Declaration when Chevron entered into the Chevron Release. Op. Br. at 17. MRCA argues that the Chevron Declaration provided that any modification or amendment required prior written consent of both Grantor (Chevron) and Grantee, which includes MRCA. Ibid. MRCA objected to the Chevron Release at the June 19, 2012 Whittier City Council meeting. Therefore, Whittier breached the Chevron Declaration by acting without MRCA's consent, and MRCA is entitled to rescission of the Chevron Declaration, specific performance of the consent requirement, and

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[25]Respondents also rely on the general principle that specific performance should not be compelled unless "[t]he agreed counterperformance has been substantially performed or its concurrent or future performance is assured or, if the court deems necessary, can be secured to the satisfaction of the court" (Civ. Code 3386(b)) to conclude that the District cannot be compelled to consent. Opp. at 28-29. This argument is spurious. The District is seeking the remedy of an opportunity to exercise its discretion. Even if it were not, mandamus exists to compel a public agency to exercise its discretion one way or the other.

damages. Op. Br. at 18.

As pertinent herein, the Chevron Declaration, entered into by Chevron and TPL on the closing date of sale, did several things.

First, it stated an intent to create a 600 acre wildlife and open space conservation easement over the Chevron Tract which would be "retained forever" in a natural, undeveloped open space condition subject to permitted uses defined in the Declaration (¶1).

Second, it generally described the area covered by the conservation easement (the "Conservation Easement Area") as covering portions of the "Restricted Property."[26] The parties attached maps of the Restricted Property and the portions which constituted the Conservation Easement Area (¶2).

Third, Chevron wanted the right to enter into a HCP with U.S. Wildlife and record a wildlife habitat easement for the purpose of obtaining credits for the cleanup and oil development of its other Properties in California (Recital E). Therefore, Chevron reserved the right to transfer a non-exclusive easement over 600 acres of the Restricted Property (the Conservation Easement Area) for a wildlife habitat easement to U.S. Wildlife – or other entities, which included CDFG, the Wildlife Corridor Conservation Authority, MRCA and Habitat Authority -- if it (Chevron) was able to negotiate a HCP with U.S. Wildlife and obtain credits (¶3). The legal description of the Conservation Easement Area would be defined at that time (¶4).

Fourth, Chevron's right to record a wildlife habitat easement lasted only five years after sale closing. If Chevron failed timely to record the easement, then it and "Grantee" were required to agree on which entity would hold the conservation easement and the precise boundaries of the Conservation Easement Area. Chevron would then prepare a Conservation Easement and the Chevron Declaration would be released (¶3).

Finally, Chevron and TPL agreed that the Restricted Property shall be held, used, and leased subject to its restrictions for "each and every person or entity who now or in the future owns" any portion of it. 4 AR 877. The parties specifically contemplated that Whittier, SMMC, MRCA, and another entity might be TPL's successors-in-interest (¶9). They agreed that the term "Grantee" would include TPL's successors and assigns, specifically including MRCA. They further agreed that all parties acquiring the Chevron Tract after the date the Chevron Declaration was recorded would take title subject to its terms (¶12). Finally, they agreed that the Chevron Declaration would bind all successors and assigns and shall run with the land as a servitude on the Restricted Property (¶22).[27]

Respondents acknowledge the consent requirement in the Chevron Declaration, and contend that the restriction "ran with the land," passing in the triple closing from Chevron to Grantee TPL, momentarily to MRCA, and then to Whittier. As MRCA was a middleman successor-in-interest, Respondents argue that MRCA has no interest in the Chevron Declaration

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[26]The Chevron Declaration does not define the term "Restricted Property." Despite the definition of the 600 acre Conservation Easement Area as covering only portions of the Restricted Property, the two areas were intended to be congruent. *See* Shue Decl., ¶7.

[27]Although there are ambiguities in the Chevron Declaration, the Declaration of Tily Shue supports the above interpretation, and Respondents do not argue otherwise.

and lacks standing to enforce it. Opp. at 29.

Respondents are mixing the three sale agreements passing title (the PCH/TPL Purchase Agreement, the TPL/MRCA Sale Agreement, and the MRCA/Whittier Sale Agreement) with the Chevron Declaration.

All of the sale agreement sold the Chevron Tract to the buyer, and none required a conservation easement. The PCH/TPL Purchase Agreement contemplated a conservation easement for wildlife habitat because PCH was negotiating with U.S. Wildlife for a permit to allow a take of a threatened bird species in cleaning up the Chevron Tract. For five years, TPL, as buyer to cooperate if a Habitat Conservation Plan (HCP) was created. The TPL/MRCA Sale Agreement, passing title to MRCA, and the MRCA/Whittier Sale Agreement, passing title to Whittier, also did not require a conservation easement. Both contracts only required the buyer to assume the obligation to cooperate in a wildlife habitat conservation easement with U.S. Wildlife (or other appropriate agency).

The Chevron Declaration is a separate agreement restricting the Chevron Tract. It is not part of the sale agreements, although it was recorded on the same date. It is a restriction executed by an owner of land binding upon successive owners, the purpose of which is to retain land in its open space and natural condition. As such, the Chevron Declaration qualifies as a conservation easement. *See* Civ. Code §815.1. The Declaration may be enforced by injunction. *See* Civ. Code §815.7.

Moreover, MRCA is clearly a defined Grantee under the Chevron Declaration which can enforce its terms. MRCA need not hold title to the Chevron Tract to enforce this provision. *See* BCE Development v. Smith, (1989) 215 Cal.App.3d 1142, 11448 (parties' intent in creating covenant controls who may enforce it, not retention of legal interest). Contrary to Respondents' argument (Opp. at 29), the parties to the Declaration did intend that MRCA would be a defined gatekeeper to the Chevron Declaration.

By adopting the Chevron Release without MRCA's consent, Whittier breached the Chevron Declaration. Unlike the Project Agreement, the Chevron Declaration's conservation easement has no time limit and may be enforced in perpetuity, subject to any other provision of law. Civ. Code §815.7 (benefit to land not required to enforce conservation easement). MRCA is entitled to an injunction against the Chevron Release. It is also entitled to specific performance of the determination of the legal boundaries for the Conservation Easement Area. Any damages will be tried in a direct calendar court pursuant to the parties' stipulation.

K. Breach of the Public Trust Doctrine

Petitioners argue that a "public trust" was created when Whittier purchased the Chevron and Unocal Tracts with Prop. A funds, as well as by the Chevron Declaration and Unocal Restrictive Declaration, both of which imposed perpetual conservation easements running with the land under Civil Code sections 815.1, 815.2, and 815.7. Op. Br. at 15. They note that a consistent line of cases have enforced public and private land dedications for park or open space purposes and enjoined conflicting uses. Op. Br. at 15. As discussed *post*, only MRCA has timely raised this claim.

"A public trust is created when property is held by a public entity for the benefit of the general public." Welwood, *supra*, 215 Cal.App.3d at 1017. Any attempt to divert the use of the

property from its dedicated purposes or uses incidental thereto would constitute an *ultra vires* act." Ibid.

Thus, in Welwood, a city acquired library property through two grant deeds from private individuals conditioned on the property's use for library purposes. The city and its redevelopment agency entered into several agreements with a developer to develop the property by razing part of the library and using it for a restaurant. The court concluded that the proposed use of the property did not contribute to its intended use and would violate the restriction that the city "forever maintain" a library at the property. Id. at 1016.

In Marshall v. Standard Oil Co., ("Marshall") (1936) 17 Cal. App. 2d 19, a taxpayer filed an action to enjoin the city and its lessee oil company from drilling and oil production on a strip of land because the deed granting the land to the city required it to be used "exclusively for street purposes." The appellate court affirmed the trial court's order enjoining the lessee's drilling and oil production on a public street, finding that the city had accepted a trust obligation to use the property for an exclusive purpose. Id. at 25. Any monetary benefit the city might receive from oil production could not be considered. Id. at 29-30.

Similarly, in Big Sur Properties v. Mott, ("Big Sur") (1976) 62 Cal.App.3d 99, a property owner sought mandamus to compel the State Department of Parks and Recreation to permit vehicular access across a park which had been deeded for use in perpetuity as a public park. Where a tract of land is donated to a city with a restriction on its use, such as where it is dedicated solely for a park, the city cannot legally divert the use of such property to purposes inconsistent with the grant. Id. at 103. "Such land is held upon what is loosely referred to as a 'public trust,' and any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto is an *ultra vires* act. Id at 104.

Petitioners also contend that where a public trust is created through dedication of land, any challenged purpose must contribute directly to the public trust purpose, citing Welwood and Big Sur. Op. Br. at 16. Where a dedication is for a "specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose." County of Solano v. Handlery, (2007) 155 Cal.App.4th 566, 575. Petitioners argue that Whittier accepted Prop. A funds, bought the Chevron and Unocal Tracts with them, and accepted the Chevron Declaration and Unocal Restrictive Use Declaration imposing open space limitations in perpetuity. Oil production does not contribute directly to this public trust purpose. Op. Br. at 17.

Chevron granted the Chevron Tract to TPL, and ultimately to Whittier, and the parties agreed in the Chevron Declaration on a Conservation Easement for the Tract. The Chevron Declaration created a 600 acre wildlife and open space conservation easement in perpetuity. Whittier chose voluntarily to acquire the Tracts with Prop. A funds, enter into the Project Agreement, and accept the Chevron Declaration and Unocal Restrictive Declaration. Property acquired with Prop. A funds can be disposed of through the Lease with the District's consent. The District's consent can also be obtained for the Lease under the Project Agreement, which terminates in June 2015 if the District declines. But the Chevron Declaration -- requiring that the 600-acre Conservation Area be retained forever in an natural undeveloped open-space condition

...for wildlife habitat and habitat restoration processes" – lasts in perpetuity.[28]

Respondents assert that Welwood, Marshal, and another case cited by Petitioners are inapposite because the California Supreme Court long ago in Boone v. Kingsbury, (1928) 206 Cal. 148, 181-82, upheld the Legislature's decision to lease public trust lands for oil and gas exploration because such uses were consistent with the State's public trust obligations. Opp at 22. The Legislature since has granted discretionary authority to cities to lease their property for oil and gas production, including property "dedicated or acquired as a public park." *See* Pub. Res. Code §7057. Consequently, Respondents argue, Welwood, which involves an attempt to avoid a library deed restriction without statutory authorization, and Marshall, which involved an attempt to lease oil drilling rights in violation of a deed restriction for street purposes only, are distinguishable. Opp. at 23.

It is true that a city may generally permit oil and gas exploration on public lands. Boone v. Kingsbury (1928) 206 Cal. 148 (oil, gas, and mineral exploration permitted on tidal ands because applicable statute found that drilling would not substantial impair public interest in navigable waters); Western Oil & Gas Asso. v. State Lands Com. (1980) 105 Cal. App. 3d 554, 563 (denying oil company challenge to state commission's rental fees for a pipeline as unreasonable burden on commerce because pertinent statutes authorized lease of tidelands under terms in the best interests of the state). But nothing in the general law permitting a city to lease public land for oil exploration permits Whittier to do so where land was acquired conditioned on a dedicated use.

Respondents also rely on Public Resource Code section 7057 ("section 7057"), which expressly provides for oil and gas production on public park lands, stating in part:

> "The property of any city may be leased for the purpose of producing or effecting the production of minerals, oil, gas or other hydrocarbon substances for a period not to exceed 35 years unless such property shall have been dedicated or acquired as a park, highway, street, walk or public playground, in which event such property may be leased for such purposes provided that the use of such property for park, highway, street, walk or public playground purposes shall not be substantially interfered with thereby ...."

The express language of section 7057 permits oil leases unless "dedicated or acquired" as a park, in which case the property may be leased for oil purposes if it does not substantially interfere with that use. The District has acknowledged that the project will not substantially interfere with the use of the property for park purposes; only seven of the 1,280 acres in the Chevron and Unocal Tracts will be affected on the surface, with the rest limited to subsurface extraction of oil which would have minimal impact on the open space characteristics of the Tracts. As a result, public use and enjoyment will be minimally impacted. 7 AR 1512.

Petitioners argue that the FEIR shows that the project will result in significant and unavoidable surface impacts to open space and recreation. Op. Br. at 20. A significant and

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[28]Whittier agreed to this restriction. Whittier, in fact, insisted on a restriction in perpetuity for the Unocal Declaration. 4 AR 952.

unavoidable impact is not the same as substantial interference. Under section 7057, the evidence before the court shows that the Lease would not "substantially interfere" with the open space use of the Chevron Tract.

The question, however, is whether section 7057's grant of permission for oil leases in a public park so long as the oil production will not substantially interfere has any bearing in this case. Where private property is dedicated to a particularly use, public trust law requires that any use directly contribute to the dedicated public trust purpose. It is not a question of substantial interference; it is a question of whether the Declaration's express provisions will be enforced. *See* Marshall 17 Cal. App. 2d at 29 (the issue was not damages, but whether the trust provisions preventing any use of property except as a street should be enforced).

In Big Sur, *supra*, 62 Cal.App.3d at 99, the property owner argued that the state should authorize vehicular access through a park because it was authorized by Public Resource Code 5003.5. The court rejected the argument, finding that the statute must be read consistently with the public trust doctrine. Id. at 105. The court declined to presume that the legislature in enacting the pertinent statute intending to overthrow long-established principles of law without making that intention clear by express declaration or necessary implication. Ibid. The court held that application of section 5003.5 only to property acquired without express and exclusive restriction to use for park purposes was consistent with the long-established difference in construction and treatment between dedications by private donors and dedications by the public. Ibid.

Section 7057 permits a city to use publically dedicated park land for oil production, but there is no reason to presume that the Legislature intended to override the private dedication of the Chevron and Unocal Tracts for open space use.

The evidence shows that oil production on a portion of the Chevron Tract would be of great monetary benefit to Whittier. In turn, these monies could be used in whole or in part to acquire and maintain open space property for public use. But the court cannot change the law, the Chevron Declaration, or MRCA's right to enforce them.[29]

MRCA is entitled to an injunction against the project based on its mandamus claim for violation of public trust.

L. The CEQA Claim

The District argues that Whittier's May 8 and June 9, 2012 amendments to the Lease were conducted without environmental review in violation of CEQA. Op. Br. at 23. The May 8 amendment eliminated the requirement that Matrix obtain a release from the District through the issuance of a CUP of the Restricted Property's protected status before commencement of the project and for any additional drill sites Matrix requests. The June 9 amendment, the Chevron Release, released the Restricted Property on the Chevron Tract from the restrictions of the Chevron Declaration.

The District notes that the FEIR acknowledged that a release from protected area status

[29]The parties assume that slant drilling under, but not on the surface of, the Chevron Tract would comply with the Chevron Declaration and public trust law. This fact may ease Whittier's dilemma.

was required from the District. *See* 10 AR 2204. The District contends that the Lease amendments changing this requirement and releasing the protected status were projects under CEQA. These projects had environmental consequences in eliminating two protections which ensured Prop. A consistency. Op. Br. at 24. Therefore, the District concludes that Whittier was obligated to perform some kind of environmental review for the impacts of this change. Ibid. The District contends that the environmental review required is a subsequent or supplemental EIR or addendum. Reply at 9.

Respondents correctly argue that the Lease amendments are not a "project." *See* Pub. Res. Code 21065.[30] The word "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by responsible agency. It does not mean each separate governmental approval. Guidelines[31] §15378(c).

The FEIR is final and may not be challenged. In the FEIR, Whittier took the position that a release from the District would be sought, but the District had no discretionary authority with respect to the Lease because Whittier could sell or dispose of the Chevron Tract without District approval. The District's remedy under Prop. A was either reimbursement or new Prop. A property, but it had no discretionary approval authority over the project. 11 AR 2538. As discussed *post*, this conclusion was in error.

Nonetheless, Respondents are correct that the amendments were not a CEQA project. Had Whittier been correct that the District had no discretionary authority, then the amendments deleting submission of a release to the District were not a project. While Petitioners are correct that the District does have discretionary authority under Prop. A and the Project Agreement, that authority is exercised through the District's independent review as a responsible agency. Whittier's mistaken effort to delete a requirement for a release from the District does nothing to affect the District's authority or responsibility. And the fact that the District has a separate approval responsibility does not make Whittier's mistaken amendments a project under CEQA.

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[30]Pub. Res. Code section 21065 states:

> "Project" means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:
>
> (a) An activity directly undertaken by any public agency.
> (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
> (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

[31]As an aid to carrying out the statute, the State Resources Agency has issued regulations called "Guidelines for the California Environmental Quality Act" ("Guidelines"), contained in Code of Regulations, Title 14, Division 6, Chapter 3, beginning at section 15000.

See Guidelines §15387(c).[32]

Whittier's amendments did not violate CEQA.

J. Use of Proceeds from the Lease

Section 16(b) provides that if a change in use occurs on Prop. A property, or the entire property is sold, the agency owner must pay the amount of the grant, the fair market value of the property, or the proceeds of sale, which is greater, for an authorized Prop. A purpose or reimbursed to the District. Section 16(b) further provides that if the property sold or disposed of is less than the entire interest of property originally acquired, an amount equal to the fair market value or the proceeds, whichever is greater, of the property sold/disposed of shall be used for an authorized Prop. A purpose or reimbursed to the District.

The parties dispute the proper use of the proceeds from the Lease. Petitioners argue that the Lease is a change in use, and all Lease payments and royalties constitute the proceeds of the property disposed of and must all be expended in compliance with Prop. A and not for general fund purposes. Op. Br. at 26-30.

Respondents claim that the Lease payments and royalties can be used for various purposes. They note that the Project Agreement provides that gross income from non-recreational purposes must be used for recreation development, acquisition, operation, or maintenance at the project site, unless the District approves otherwise. Opp. at 29. This provision contemplates business revenues from public facilities and does not concern oil revenues. Respondents also argue that "to some extent" the issue is not ripe because no royalties have been generated. Ibid.

The dispute over Lease proceeds is moot because specific performance and injunctive relief must be granted. The court notes, however, that Respondents have completely ignored the requirements of section 16(b). They make no argument that section 16(b) requires less than the entire amount of Lease payments and royalties to be used for Prop. A purposes. Whatever the Project Agreement states, Prop. A requires the greater amount of fair market value, grant amount, or proceeds from the transaction be used for Prop. A purposes. Whittier cannot deposit the revenue into its general fund. Nor could it pay Habitat Authority without District approval.

K. Conclusion

The Petitions are granted for the District and MRCA on the claims stated above. The case will be referred to Dept. 1 for assignment to a direct calendar court on the damage portion of those claims. As the damage claims remain, no judgment can be issued in favor of the District or MRCA. (Judgment can be issued against SMMC.) The court also cannot issue a writ of mandate

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[32]Petitioners argue that the amendments constitute a change in the project description, which required Whittier to obtain the District's consent to the change in protected area status. Op. Br. at 23; Reply at 14. Actually, the project description states both that Whittier will be required to reimburse the District or provide comparable open space land, and that the Lease contains a provision that Whittier will not issue a CUP without a release from the District. 10 AR 2204. Whittier's deletion of the Lease requirement is not a material deviation from the project description requiring further environmental review.

or final injunction, or order specific performance, without a final judgment. The court will consider preliminary injunctions in favor of Petitioners District and MRCA, as each is entitled to a final injunction.